UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

THOMAS LUSSIER,	)	
	)	
PLAINTIFF	)	
	)	
v.	)	**CIVIL NO. 92-397-P-H**
	)	
MARVIN RUNYON, UNITED STATES POSTMASTER GENERAL,	)	
	)	
DEFENDANT	)	

ORDER ON MOTION TO REOPEN THE RECORD

This case is a procedural nightmare. The issue remaining after appeal is the setoff of civil service retirement disability benefits from a front pay award for disability discrimination. Ostensibly, the plaintiff Thomas Lussier won a portion of his appeal. The First Circuit Court of Appeals approved his contention that "the entire enterprise [by which I as a trial judge accepted evidence of his civil service disability retirement benefits] was procedurally infirm." Lussier v. Runyon, 50 F.3d 1103, 1113 (1st Cir.), cert. denied, ___ U.S. ___, 116 S. Ct. 69, 133 L. Ed. 2d 30 (1995). According to the court of appeals, the method by which I received this evidence did not permit Lussier to explore "the amount received, how the amount was derived, its significance in relation to the likely size of Lussier's disability retirement annuity, and the relevance (if any) of the interim benefits to front pay." Id. at 1114. The court of appeals therefore declined to address other issues about the calculations that the parties had raised. Id. at 1115.

Ironically and sadly, Lussier's "victory" on appeal seems likely to give him a substantially reduced judgment. One might have thought that he thereby lacked a sufficient stake in the outcome to achieve a reversal.

PROCEDURAL HISTORY

After a bench trial in this matter, I awarded judgment to Lussier against the Postal Service, finding that he was a victim of disability discrimination. Lussier v. Runyon, No. 92-397-P-H, 1994 WL 129776, at *9-10 (D. Me. Mar. 1, 1994). I granted Lussier "front pay"—i.e., future wages—reduced by setoffs for other benefits he would receive because of his dismissal. Id. at *11. Before and during the trial, Lussier objected to any testimony or evidence about his eligibility for, or the amount of, any civil service disability retirement benefits. Essentially he argued that the collateral source rule prevented considering them as a setoff; that, in addition, he had contributed some of the premiums, an additional argument against setoff; and that their duration was too uncertain to justify a setoff. These issues were fully argued before and/or during the trial. I ruled against Lussier on all three issues in a pretrial ruling, Lussier v. Runyon, No. 92-397-P-H, 1993 WL 434078, at *2 (D. Me. Oct. 15, 1993), and in my initial Findings of Fact and Conclusions of Law. See 1994 WL 129776, at *11, Conclusion of Law No. 9 & n.7 (collateral source rule and Lussier's own contributions do not prevent setoff); id. at *9, Finding of Fact No. 42 (disability retirement benefits will continue so long as Lussier does not earn 80% of his previous pay); id., Finding of Fact No. 40 (Lussier's future income potential, an amount—approximately $18,260 per year—obviously far less than 80% of his previous pay of over $37,000 per year; see Transcript Vol. II at 342-43, 351.).

The court of appeals affirmed my ruling that the collateral source rule was not mandatory and ruled that as a trial judge I had the discretion on whether to apply it in making a front pay award, as here. 50 F.3d at 1105. The court of appeals specifically affirmed my refusal to apply the collateral source rule to Lussier's Veterans Administration ("VA") benefits and affirmed my reduction of his front pay award by the amount of those benefits. Id. at 1112. With respect to Civil Service Retirement System ("CSRS") disability benefits, the court of appeals stated: "In general, the view that we take of the flexible interplay between front pay and the collateral source rule extends to CSRS benefits." Id. at 1113. It declined to review my ruling on the effect of Lussier's own contributions. Id. at n.12.

At the time of the trial, Lussier had only applied for, and not yet been approved for, disability retirement benefits. Because the Postal Service produced evidence that the benefits, if ultimately awarded, would be substantial (a then present value of $342,504 based upon the Postal Service's witness's calculations of Lussier's income history), I requested follow-up evidence on whether the benefits had in fact been awarded and, if so, in what amount. Although the relevance of such benefits was hotly contested at trial, the award (if it had in fact occurred) and its amount did not seem otherwise open to factual dispute. Lussier objected—I thought because he contended that the disability retirement benefits could not be set off for the three reasons I already have listed, legal and factual positions I already had explicitly rejected. He then provided over protest what he described as the amount of "interim benefits" he actually had been awarded, a substantially lower amount (a then present value of only $112,723) than the Postal Service had forecast. Having ruled against Lussier on his three arguments why disability retirement benefits could not be considered at all, I accepted this number that he provided as the benefits he was then receiving, believing that it was

more favorable to him than any alternative. I rejected the Postal Service's higher numbers because they were (a) unsubstantiated at the time of trial and (b) provided too late post-trial.

Lussier appealed successfully, the court of appeals ruling that my acceptance of this post-trial evidence that Lussier gave me over objection "affected substantial rights" because it "reduce[d]" Lussier's front pay award. 50 F.3d at 1113. It is obvious that Lussier was harmed by my acceptance of his post-trial submission, however, only if I was prohibited from reopening the record (based upon the record as it existed at closing argument he could argue that the Postal Service had not proved that benefits would be awarded and therefore should receive no setoff), a conclusion that the court of appeals expressly disavowed. Otherwise, he was helped by it in light of the Postal Service's request for a far greater setoff, based upon the final award (a present value of approximately an additional $250,000). The appellate court's reversal and remand would have made more sense if the court of appeals had endorsed the Postal Service's argument that I improperly prohibited the Postal Service from introducing late evidence that Lussier was receiving much higher benefits than interim amounts. The court of appeals also refused to make that ruling, however, and indeed intimated that I might have been affirmed if I had denied the setoff entirely because of the Postal Service's misconduct. See id. at 1115, n.17.

Ultimately, the court of appeals stated that it would "neither dictate how the district court should proceed on remand nor restrict its range of options." Id. at 1115. It then went on to suggest two possibilities. Realistically speaking, the options open to me appear to be the following:

1. Decide the damages portion of the case on the record as it existed at closing argument, the option that Lussier supports most strenuously. On this basis, Lussier seeks to increase his previous $395,000 award by an additional $112,723, the amount I subtracted for the then

present value of the interim disability retirement benefits. The Postal Service, on the other hand, contends that it is entitled to a reduction in the judgment awarded Lussier based upon the evidence available at the time of closing argument. Specifically, the Postal Service maintains that based upon the record as it then existed I should have subtracted the $342,504 present value of the disability retirement benefits as it then calculated them. This would reduce Lussier's judgment from $395,000 to $165,219.

I stated quite explicitly in my initial findings of fact and conclusions of law that the evidence at the time of closing argument did not permit me to conclude that benefits had in fact been awarded or what their amount would be. These were the Postal Service's burden of proof, since it was the party seeking a setoff. I see no reason to alter that conclusion. The Postal Service now argues that I could have provided the setoff and then left Lussier to file a Rule 60(b) motion later to change the result if the numbers turned out wrong. The Postal Service has the burden backward. But I also revealed clearly my belief that the amount of the benefits was so substantial and a decision on their award so imminent that it would be an unfair windfall to Lussier to ignore them. I likewise see no reason to alter that conclusion and the court of appeals has confirmed that I do have the authority to keep the record open or to reopen it for that purpose. Consequently, I conclude for the same reasons that have been in existence throughout this case that it is inappropriate to decide the case solely on the evidence as it existed when the parties made their closing arguments.

2. Reopen the record generally on damages. This is Lussier's second choice. Lussier maintains that since the bench trial the facts have changed on his continuing eligibility for VA benefits and his employability. He argues that it would be unfair to reopen the record on what has occurred on only one element of damages (disability retirement benefits) without considering other

damage-related elements as well. Although the court of appeals professed not to be limiting what I should do on remand, this course suggested by Lussier appears inconsistent with general principles of appellate law of the case inasmuch as the court of appeals has already ruled on the VA benefits setoff, even as to alleged errors in their original calculation, 50 F.3d at 1112, at n.11. To reexamine damages as a whole now would make a mockery of the judicial economy that is ordinarily obtained by not reopening matters already approved by the court of appeals. See United States v. Connell, 6 F.3d 27, 30-31 (1st Cir. 1993); see also United States v. Rivera-Martinez, 931 F.2d 148, 150-52 (1st Cir.), cert. denied, 502 U.S. 862, 112 S. Ct. 184, 116 L. Ed. 2d 145 (1991).

3. Reopen the record solely to determine what CSRS benefits Lussier is receiving and any contingencies on the continuation of those benefits not already addressed at trial. This is the Postal Service's second choice and the option Lussier opposes. This option will quite probably reduce Lussier's judgment by well more than half unless there are factual issues in the disability benefit calculations that the parties have chosen not yet to share with me. This would be a hollow "victory" awarded Lussier by the court of appeals. This outcome also would have the negative consequence of removing any sanction or penalty upon the Postal Service for its disregard of my post-trial orders. My earlier decision to subtract only the smaller amount of interim benefits was based in part upon that misconduct; the court of appeals likewise viewed the Postal Service's behavior as deserving of sanction, intimating it could have received even harsher treatment. 50 F.3d at 1115, n.17.

I find none of the options attractive. It seems to me that the original resolution is still the most equitable, not granting Lussier a total windfall, but also penalizing the Postal Service to some degree for its omissions in presenting the case. That option, however, is no longer open. As among

the three remaining options, I reluctantly conclude that No. 3 is the most appropriate. It allows me to give the maximum deference to the status of the case as affirmed by the First Circuit without closing my eyes to the reality that Lussier probably has qualified for a substantial CSRS benefit. I also observe that in discussing reopening of the record the court of appeals referred only to "the purpose of obtaining more information about Lussier's CSRS benefits," not any other purpose. Id. at 1115. Consistent, therefore, with what I understand to be the mandate of the court of appeals, I now reopen the record to hear evidence on what CSRS benefits Lussier has been awarded and is receiving, and any additional contingencies on their continuing receipt that were not raised and addressed at the time of my earlier rulings.

The Clerk's Office shall schedule a conference before the magistrate judge for purposes of discussing the number of witnesses, the length of their testimony and the number of exhibits, and for settlement negotiations. Counsel shall meet and confer in person at least four (4) business days before that conference to discuss these issues and two (2) business days before the conference shall submit a joint pretrial statement and confidential settlement memoranda for the use of the magistrate judge, the latter not to be disclosed to anyone else.

SO ORDERED.

DATED AT PORTLAND, MAINE THIS 16TH DAY OF FEBRUARY, 1996.

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE